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# IN THE
# COURT OF APPEALS OF INDIANA

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| GORDON MACK ELKINS, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 57A03-0708-CR-402 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE NOBLE SUPERIOR COURT
The Honorable Stephen S. Spindler, Senior Judge
Cause No. 57D02-0609-CM-1053

**March 7, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## Case Summary

Gordon Mack Elkins ("Elkins") appeals his conviction for Invasion of Privacy, as a Class A misdemeanor.[1] We affirm.

## Issues

Elkins raises two issues, which we re-state as follows:

I. Whether the evidence was sufficient to support his conviction; and

II. Whether his sentence is inappropriate.

## Procedural History

Elkins allegedly violated an Amended Order for Protection.[2] The State charged him with Invasion of Privacy. At a bench trial, Elkins was found guilty as charged and sentenced to ninety days imprisonment at the Noble County Jail. The trial court stayed the sentence, pending appeal. Elkins now appeals.

## Discussion and Decision

### I. Sufficiency of the Evidence

Our standard of review is well-established.

> In reviewing a claim of insufficient evidence, we will affirm the conviction unless, considering only the evidence and all reasonable inferences favorable to the judgment, and neither reweighing the evidence nor judging the credibility of the witnesses, we conclude that no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.

Bethel v. State, 730 N.E.2d 1242, 1243 (Ind. 2000) (citations omitted). Accordingly, the

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[1] Ind. Code § 35-46-1-15.1.

facts below are those most favorable to the judgment.

The State had to prove beyond a reasonable doubt that Elkins knowingly violated a protective order to prevent family violence. An Amended Order for Protection enjoined Elkins "from threatening to commit or committing acts of domestic or family violence against" B.E. Exhibit A. Specifically, it prohibited Elkins "from harassing, annoying, telephoning, contacting, or directly or indirectly communicating with" B.E. Id.

Twelve-year-old B.E. is Elkins' daughter.[3] On July 15, 2006, B.E. attended the county fair with her sisters, including K.W. B.E. saw Elkins "and he called [her] over," by saying "[B.E.] come here." Transcript at 9-10. B.E. testified that Elkins was five feet away from her and indicated her perception of that distance by referencing the distance from herself to a person in the courtroom. K.W., also a daughter of Elkins, testified that she saw Elkins while she was with B.E. at the fair. She then described B.E.'s reaction:

> [S]he started crying and I said what's wrong? She said I want to call my mom. And I said why[?] [S]he said because Dads trying to talk to me. And I said okay so [C.J.] gave [B.E.] her phone so she could call mom and [B.E.] called mom and said my dads trying to talk to me. He's trying to motion me into wherever he's wanting to talk to me at.

Tr. at 16. K.W. then testified that she saw Elkins two or three times that day.

Elkins argues that the testimony was "incredibly dubious because B.E. and [K.W.'s] accounts of where they were and what they were doing at the time completely contradict each other." Appellant's Brief at 4. Our Supreme Court has explained the incredible dubiosity

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[2] The original Order for Protection was entered January 9, 2006, and protected five female family or household members. The Amended Order for Protection, entered three days later, added B.E.

rule as follows:

> If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.

Fajardo v. State, 859 N.E.2d 1201, 1208 (Ind. 2007) (quoting Love v. State, 761 N.E.2d 806, 810 (Ind. 2002)).

This rule does not apply where conflicts arise allegedly from the testimony of multiple witnesses. Accordingly, the rule cannot be applied in the manner Elkins has requested. Nor can we conclude that B.E.'s testimony was so inherently improbable that no reasonable person could believe it. She testified, without ambivalence, that Elkins saw her, spoke to her, and asked her to approach him. The trial court made clear that it found B.E. to be credible. K.W. and B.E.'s mother observed Elkins at the fair. Meanwhile, the Amended Order for Protection prohibited Elkins from communicating with B.E. There was sufficient evidence to support the conviction.

## II. Independent Review of Sentence

Under Indiana Appellate Rule 7(B), this "Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B); see IND. CONST. art. VII, § 6. "[A] defendant must

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[3] B.E. was thirteen when she testified. She was diagnosed as mildly mentally handicapped and functioned at

persuade the appellate court that his or her sentence has met this inappropriateness standard of review." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

The maximum sentence for a Class A misdemeanor is one year. Ind. Code § 35-50-3-2. The trial court sentenced Elkins to ninety days in jail, one quarter of the maximum sentence. As to the nature of the offense, Elkins knowingly violated an Order for Protection. His victim was a twelve-year-old diagnosed as mildly mentally handicapped. B.E.'s counselor testified extensively about the significant and negative effect this incident had on B.E.'s health. As to his character, Elkins has at least four prior convictions: two for operating a vehicle while intoxicated, one for public intoxication, and one for non-support of a dependant. Having considered the record, the sentence, and the parties' arguments, we conclude that Elkins' sentence is not inappropriate.

**Conclusion**

There was sufficient evidence to support the conviction for Invasion of Privacy. In light of the nature of the offense and Elkins' character, his sentence is not inappropriate.

Affirmed.

NAJAM, J., and CRONE, J., concur.

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the time of the trial as a six- or seven-year-old.